

FELONY DUIS

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¹Any opinions expressed are those of the author, and not the official position of the Washington Association of Prosecuting Attorneys, nor of any individual prosecuting attorney's office.

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I. Introduction to the New Law

Beginning July 1, 2007, some individuals who are arrested for DUI or physical control will face felony penalties. The underlying conduct of the felony DUIs and felony physical control (hereinafter referred to as “felony DUI”) is exactly the same as for the current DUI and physical control charges. The controlling factor is the individual’s prior criminal history.

An individual will potentially face prison for a DUI or physical control committed on or after July 1, 2007, if:

1. The individual was previously convicted of vehicular homicide while under the influence of intoxicating liquor or any drug in violation of RCW 46.61.520(1)(a).
2. The individual was previously convicted of vehicular assault while under the influence of intoxicating liquor or any drug in violation of RCW 46.61.522(1).
3. The individual was arrested for the current offense within 10 years of four separate arrests,² each of which resulted in one or more of the following:
 - a conviction for a violation of RCW 46.61.502 (DUI) or an equivalent local ordinance
 - a conviction for a violation of RCW 46.61.504 (physical control) or an equivalent local ordinance
 - a conviction for a violation of RCW 46.61.5249 (negligent driving in the first degree), 46.61.500 (reckless driving), or 9A.36.050 (reckless endangerment) or an equivalent local ordinance if the defendant was originally charged in the case with a violation of RCW 46.61.502 (DUI), or 46.61.504 (physical control), or an equivalent local ordinance, or of RCW 46.61.520 (vehicular homicide under any prong) or 46.61.522 (vehicular assault under any prong)
 - a conviction in another state which is the equivalent of a violation of RCW 46.61.502 (DUI), or 46.61.504 (physical control), or an equivalent local ordinance, or of RCW 46.61.520 (vehicular homicide under any prong) or

²Laws of 2007, ch. 474, § 1(13)(c) defines the term "within ten years" as follows:

"Within ten years" means that the arrest for a prior offense occurred within ten years of the arrest for the current offense.

Recent case law establishes that the ten year period includes offenses that occur both before and after any single incident. *See City of Seattle v. Quesada*, COA No. 58336-1-I (Dec. 3, 2007); *City of Seattle v. Winebrenner*, COA No. 58710-2-I (Dec. 3, 2007).

46.61.522 (vehicular assault under any prong)

- a conviction in another state which is the equivalent of a violation of RCW 46.61.5249 (negligent driving in the first degree), 46.61.500 (reckless driving), or 9A.36.050 (reckless endangerment) or an equivalent local ordinance if the defendant was originally charged in the case with a violation of RCW 46.61.502 (DUI), or 46.61.504 (physical control), or an equivalent local ordinance, or of RCW 46.61.520 (vehicular homicide under any prong) or 46.61.522 (vehicular assault under any prong)
- a deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance. *[Note: the entry of a deferred prosecution and the conviction following its revocation are counted as one single prior offense.]*
- a deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249 (negligent driving in the first degree), or an equivalent local ordinance if the defendant was originally charged in that case in which the deferred prosecution was granted with a violation of RCW 46.61.502 (DUI), or 46.61.504 (physical control), or an equivalent local ordinance, or of RCW 46.61.520 (vehicular homicide under any prong) or 46.61.522 (vehicular assault under any prong) *[Note: the entry of a deferred prosecution and the conviction following its revocation are counted as one single prior offense. See City of Seattle v. Quesada, COA No. 58336-1-I (Dec. 3, 2007); City of Seattle v. Winebrenner, COA No. 58710-2-I (Dec. 3, 2007)]*

II. Challenges

There are some barriers to proving the felony DUI. The largest barriers are:

1. Identifying prior offenses in a timely manner so that the individual is not inadvertently allowed to plead guilty to a gross misdemeanor.
2. Obtaining adequate records to support the existence and the validity of the prior offenses.
3. Proving that the individual was represented by counsel in the court of limited jurisdiction and/or entered an adequate waiver of counsel.
4. Finding witnesses or evidence sufficient to establish that the individual arrested on the current offense was the individual who was arrested in the prior incidents.

III. Strategies for Overcoming Obstacles

A. Timely Identification of Individuals. Recommendations to assist in the timely identification of individuals who are potentially subject to felony DUI include:

1. Officers can ask individuals that they are arresting for DUI or physical control if they have ever been arrested for a similar offense in the past. If so, where and when. Documenting the answers in the reports may assist us in early identification of potential felony cases and the answers may assist us in establishing the priors at trial.
2. Officers may ask their dispatcher to check the individual's DOL record for prior offenses before the officer issues a citation for DUI or physical control.
3. In communities where officers directly file DUI or physical control citations, a referral to the prosecutors office for complaint filing is proper in those cases in which the officer cannot confirm the arrestee's criminal history. In all cases that will be filed by the prosecutor's office, the attorney reviewing the matter for charging should verify the defendant's criminal history and driving record.
4. Attorneys in courts of limited jurisdiction should begin a dialogue with the felony deputies who would be prosecuting the felony DUIs to determine how best to coordinate these cases.

B. Proving the Prior Offense. Recommendations for ensuring that adequate documentation of the prior conviction can be timely obtained include:

1. Reminding courts of limited jurisdiction of their obligation under RCW 46.52.101(1) to maintain a record of any conviction for a violation of RCW 46.61.502 or 46.61.504. This obligation exists despite any other provision of law that appears to authorize a shorter retention period.
2. Establishing a mechanism in each office for reviewing the DISCIS records related to each conviction so that all necessary pleadings can be requested at the same time. While a judgment might be sufficient to prove some prior offenses, others will require a certified court docket, a certified copy of the original charging document, a certified copy of the petition for deferred prosecution and the actual order of deferral.
3. Possibly identifying one person in each prosecutors' office who will assist attorneys in other jurisdictions in obtaining the necessary records in a timely fashion.

C. Counsel. Recommendations for proving that the defendant had counsel or entered a proper waiver of counsel include:

1. Review DISCIS for names of counsel, notices of appearances, notices of substitution of counsel, waiver of counsel colloquys.
2. Review the judgment and sentence for the name of a defense attorney.
3. Obtain copies of any written waiver of counsel. Remember that the waiver entered by someone pleading guilty is much more abbreviated than is the waiver required from someone who is proceeding to trial. The written warning of the risks of proceeding pro se that is included in some statement of right forms may be adequate if the defendant pleads guilty at arraignment. *See Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004).
4. Make sure that the judgment and sentence form that you are using has a space for the defense attorney's name and/or a place where the judge may indicate that the defendant waived counsel. Make sure that these spaces are properly filled in.

D. Identity. Recommendations for establishing that the individual arrested on the current offense was the individual who was arrested in the prior incidents include:

1. Requesting booking photographs and fingerprints from the day of arrest and/or from the day the sentence was served.
2. Obtaining the police reports from prior incidents and contacting the arresting officer and/or any civilian witnesses. Passengers in the vehicle when the individual was previously arrested may be a particularly good source for proving identity.
3. Contacting the probation officers from the prior cases. In addition to the incident that resulted in the probation officer's services, the defendant may have admitted prior incidents to the probation officer.
4. The fingerprints on the Washington felony judgment and sentences.
5. Request penitentiary packs ("penpacks") for any out-of-state felonies.
6. Contact the prosecutor from the prior offense.
7. Contact the defense attorney from the prior incident. Be aware, however, that while case law indicates it is entirely appropriate to call the defense attorney from the prior offense so that s/he can identify her client, RPC 3.8(e) prohibits a prosecutor from calling a defense attorney unless there is no other

feasible alternative to obtain the information.

8. Obtain certified copies of any documents the defendant signed in the prior cases so that a jury can compare the handwriting on the documents with your defendant's handwriting. Remember that this comparison may be accomplished without expert testimony.

IV. Suggested Best Practices in All DUI Cases

A. Identification. Steps that may be taken in new arrests to increase our ability to pursue a later felony DUI include:

1. An actual or administrative booking of every individual who is arrested for DUI. An administrative booking consists of mug shots and fingerprints.
2. If a DUI arrestee is not booked, photocopying his driver's license, military identification card, employee identification card, or any other photo identification that the defendant either produced for the officer or that the officer discovered during the search incident to arrest.
3. If a DUI arrestee is not booked and s/he has no photo identification, taking a digital photograph of the person and including a copy of the photograph and a statement in the report explaining who took the photograph and when the photograph was taken.
4. If a DUI arrestee is not booked and s/he has no photo identification with her but s/he previously had a Washington State driver's license or id card, requesting that a certified copy of the driver's license or state issued id card be sent to the arresting officer from DOL. The arresting officer will need to complete a supplemental report upon receipt of the document stating whether the picture on the certified copy of the driver's license or id card is an accurate picture of the person that the arresting officer arrested on the relevant day and time.
5. Attempting to obtain names, addresses, and contact information from every witness to the DUI. This includes all passengers who were in the car that the DUI arrestee was operating.
6. Collecting fingerprints from the DUI arrestee in the BAC room.
7. Requesting that the judge order the defendant to submit to an administrative booking as a condition of release at arraignment.
8. Workload permitting, requesting that the judge order the defendant to provide fingerprints on the judgment and sentence.

B. Evidence Collection.

Due to the increased penalties, repeat offenders may be less willing to provide a breath sample. The 2004 amendment to RCW 46.20.308(1) specifically authorizes search warrants for blood alcohol samples:

Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. ***Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.*** [Emphasis added.]

Templates of the necessary documents have been prepared and have been successfully used by a number of police agencies. Word versions of the templates, which are essentially self-explanatory, are available on the WAPA website (www.waprosecutors.org).³ These templates address issues unique to search warrants for blood alcohol:

1. Dissipation – the fact that alcohol burns off means that the search warrant must be executed in a timely fashion. The templates require the judge to set an outside limit for serving the warrant.
2. Civilian Assistance – If a non-police officer will be assisting in the execution of a search warrant, the identity of the individual, at least by occupation, must be mentioned in the search warrant affidavit and in the search warrant, itself. The templates include a statement that the withdrawal of blood pursuant to the warrant will be performed by a physician, a registered nurse, a license practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. *See* RCW 46.61.506(5).

The inventory and the return of service must identify, by name, the person who assisted in executing the search warrant for blood. The return of service should identify the profession (physician, nurse, etc.), licensure, and/or training of the person who withdrew the blood. As a courtesy, the person who actually withdrew the blood should be provided with a copy of the search warrant and the return of service.

³Any officer or prosecutor who would like additional information regarding the search warrants should contact me at pamloginsky@waprosecutors.org, and I will provide them with the training materials used at the last DRE Conference.

The templates do not discuss how to execute on a search warrant for a blood alcohol test. The Fourth Amendment permits the use of reasonable force to overcome a defendant's resistance to the execution of a warrant for the extraction of blood. *See, e.g., United States v. Bullock*, 71 F.3d 171, 177 (5th Cir. 1995) (suspect's refusal to comply with a search warrant for blood and hair samples created need for forceful execution but does not entitle him to exclusion of the evidence sought); *Hammer v. Gross*, 932 F.2d 842, 845 (9th Cir. 1991) (police may use force in some circumstances to extract a blood sample from a resistant suspect); *State v. Clary*, 196 Ariz. 610, 2 P.3d 1255 (2000) (blood alcohol sample). As a California court held,

absent a clear legislative mandate giving a defendant absolute control of whether a blood alcohol test maybe obtained, the lack of such evidence should not turn on the degree of a defendant's cooperation with a premium given to the more obstreperous drunk driver who is more successful in forcibly resisting the withdrawal of a blood ample.

Carleton v. Superior Court, 170 Cal. App. 3d 1182, 1191, 216 Cal. Rptr. 890 (Cal Ct. App. 1985).

Officers are encouraged to speak with their local prosecutors to determine whether search warrants will be utilized in their jurisdiction and to prioritize which cases merit search warrants.

V. Charging Language

Under current case law, a prosecutor may not need to specifically identify the prior offenses in the charging document. In an excess of caution, prosecutors may elect to do so. If the priors are not included in the charging document, the court may direct the prosecutor to provide a bill of particulars. General charging language and language that allows for the identification of all relevant prior offenses appears below:

Felony Driving While Under the Influence – Four or More Prior Offenses Within Ten Years — For Offenses Committed On or After July 1, 2007 – RCW 46.61.502(1) and (6)(a)

On or about the ___ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant did drive a vehicle (a) and had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore, the defendant previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(13); contrary to Revised Code of Washington 46.61.502(1) and (6)(a). (Maximum Penalty—Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.502(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

Felony Driving While Under the Influence – Prior Vehicular Homicide or Vehicular Assault Conviction — For Offenses Committed On or After July 1, 2007 – RCW 46.61.502(1) and (6)(b)

On or about the ____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant, did drive a vehicle (a) and had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore the defendant was previously convicted of vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), and/or of vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b); contrary to Revised Code of Washington 46.61.502(1) and (6)(b).
(Maximum Penalty–Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.502(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

Felony Physical Control of a Vehicle While Under the Influence – Four or More Prior Offenses Within Ten Years — For Offenses Committed On or After July 1, 2007 – RCW 46.61.504(1) and (6)(a)

On or about the ____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant did have actual physical control of a motor vehicle (a) and had sufficient alcohol in his or her body as shown by an accurate and reliable analysis of the Defendant's breath and/or blood to have an alcohol concentration of 0.08, or higher, within two hours after being in actual physical control, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore, the defendant previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(13); contrary to Revised Code of Washington 46.61.504(1) and (6)(a).
(Maximum Penalty–Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.504(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

Felony Physical Control of a Vehicle While Under the Influence – Prior Vehicular Homicide or Vehicular Assault Conviction — For Offenses Committed On or After July 1, 2007) – RCW 46.61.504(1) and (6)(b)

On or about the ____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant did have actual physical control of a motor vehicle (a) and had sufficient alcohol in his or her body as shown by an accurate and reliable analysis of the Defendant's breath and/or blood to have an alcohol concentration of 0.08, or higher, within two hours after being in actual physical control, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore the defendant was previously convicted of vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), and/or of vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b); contrary to Revised Code of Washington 46.61.504(1) and (6)(b). (Maximum Penalty–Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.504(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

A prosecutor may elect to enumerate the priors offenses in the charging language:

Felony Driving While Under the Influence – Prior Vehicular Homicide or Vehicular Assault Conviction — For Offenses Committed On or After July 1, 2007 – RCW 46.61.502(1) and (6)(b)

On or about the ____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant, did drive a vehicle (a) and had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore the defendant was previously convicted of vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), to-wit: (identify conviction with specificity, including court where conviction was obtained, and cause number), and/or of vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b) to-wit: (identify conviction with specificity, including court where conviction was obtained, and cause number); contrary to Revised Code of Washington 46.61.502(1) and (6)(b). (Maximum Penalty–Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.502(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

**Felony Driving While Under the Influence – Four or More Prior Offenses Within Ten Years
— For Offenses Committed On or After July 1, 2007 – RCW 46.61.502(1) and (6)(a)**

On or about the ____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant did drive a vehicle (a) and had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore, the defendant previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(13), to wit: [insert the appropriate alternatives from below at this point]

Alternatives for insertion. Complete a minimum of four of the following:

- a conviction for a violation of RCW 46.61.502 or an equivalent local ordinance in (identify conviction with specificity stating its title, the court where the conviction was obtained, the cause number) ON (identify the date of conviction) *(repeat entire insertion for each individual conviction)*
- a conviction for a violation of RCW 46.61.504 or an equivalent local ordinance in in (identify conviction with specificity stating its title, the court where the conviction was obtained, the cause number) ON (identify the date of conviction) *(repeat entire insertion for each individual conviction)*
- a conviction for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 in (identify conviction with specificity stating its title, the court where the conviction was obtained, the cause number) ON (identify the date of conviction), and the defendant was originally charged in that action with a violation of (specify the appropriate statute from this list : RCW 46.61.502, or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522) *(repeat entire insertion for each individual conviction)*
- an out-of-state conviction for (identify name of crime and out-of-state statute that defines the crime) which is the equivalent to

(specify the appropriate statute from this list : RCW 46.61.502, or RCW 46.61.504, or RCW 46.61.520 or 46.61.522; OR

(specify the appropriate statute from this list and insert the complete phrase: RCW 46.61.5249, 46.61.500, or 9A.36.050 and the defendant was originally charged in that action with a violation of (identify name of crime and out-of-state statute that defines the crime) which is the equivalent to (specify the appropriate statute from this list : RCW 46.61.502, or RCW 46.61.504, or RCW 46.61.520 or 46.61.522)
- a deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance in (identify case with specificity stating its title, the court where the order was entered, and the cause number) ON (identify the date the deferred prosecution order was entered) *[Note: do not count the entry of a deferred prosecution and the conviction following its revocation as two separate prior offenses. Under the rule of lenity these two events will count as a single*

offense.]

- a deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance in (identify case with specificity stating its title, the court where the order was entered, and the cause number) ON (identify the date the deferred prosecution order was entered), and the defendant was originally charged in that case in which the deferred prosecution was granted with a violation of (specify the appropriate statute from this list : RCW 46.61.502, or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522)

; contrary to Revised Code of Washington 46.61.502(1) and (6)(a).

(Maximum Penalty—Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.502(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

Felony Physical Control of a Vehicle While Under the Influence – Prior Vehicular Homicide or Vehicular Assault Conviction — For Offenses Committed On or After July 1, 2007) – RCW 46.61.504(1) and (6)(b)

On or about the ___ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant did have actual physical control of a motor vehicle (a) and had sufficient alcohol in his or her body as shown by an accurate and reliable analysis of the Defendant's breath and/or blood to have an alcohol concentration of 0.08, or higher, within two hours after being in actual physical control, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore the defendant was previously convicted of vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), to-wit: (identify conviction with specificity, including court where conviction was obtained, and cause number), and/or of vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), to-wit: (identify conviction with specificity, including court where conviction was obtained, and cause number); contrary to Revised Code of Washington 46.61.504(1) and (6)(b).
(Maximum Penalty—Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.504(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

Felony Physical Control of a Vehicle While Under the Influence – Four or More Prior Offenses Within Ten Years — For Offenses Committed On or After July 1, 2007 – RCW 46.61.504(1) and (6)(a)

On or about the ____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant did have actual physical control of a motor vehicle (a) and had sufficient alcohol in his or her body as shown by an accurate and reliable analysis of the Defendant's breath and/or blood to have an alcohol concentration of 0.08, or higher, within two hours after being in actual physical control, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and furthermore, the defendant previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(13), to wit: [insert the appropriate alternatives from below at this point]

Alternatives for insertion. Complete a minimum of four of the following:

- a conviction for a violation of RCW 46.61.502 or an equivalent local ordinance in (identify conviction with specificity stating its title, the court where the conviction was obtained, the cause number) ON (identify the date of conviction) *(repeat entire insertion for each individual conviction)*
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- a conviction for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 in (identify conviction with specificity stating its title, the court where the conviction was obtained, the cause number) on (identify the date of conviction), and the defendant was originally charged in that action with a violation of (specify the appropriate statute from this list : RCW 46.61.502, or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522) *(repeat entire insertion for each individual conviction)*
- an out-of-state conviction for (identify name of crime and out-of-state statute that defines the crime) which is the equivalent to (specify the appropriate statute from this list : RCW 46.61.502, or RCW 46.61.504, or RCW 46.61.520 or 46.61.522; OR (specify the appropriate statute from this list and insert the complete phrase: RCW 46.61.5249, 46.61.500, or 9A.36.050 and the defendant was originally charged in that action with a violation of (identify name of crime and out-of-state statute that defines the crime) which is the equivalent to (specify the appropriate statute from this list : RCW 46.61.502, or RCW 46.61.504, or RCW 46.61.520 or 46.61.522)
- a deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance in (identify case with specificity stating its title, the court where the order was entered, and the cause number) ON (identify the date the deferred prosecution order was entered) *[Note: do not count the entry of a deferred prosecution and the conviction following its revocation as two separate*

prior offenses. Under the rule of lenity these two events will count as a single offense.]

- a deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance in (identify case with specificity stating its title, the court where the order was entered, and the cause number) ON (identify the date the deferred prosecution order was entered), and the defendant was originally charged in that case in which the deferred prosecution was granted with a violation of (specify the appropriate statute from this list : RCW 46.61.502, or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522).

;contrary to Revised Code of Washington 46.61.504(1) and (6)(a).

(Maximum Penalty—Five (5) years imprisonment and/or a \$10,000.00 fine, or both, pursuant to RCW 46.61.504(6) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

IV. Sentencing Issues

Felony DUI and physical control are ranked at a seriousness level V. The statutory maximum for these offenses, however, is five years. *See* RCW 9A.20.021(c); RCW 46.61.502(6); RCW 46.61.504(6). When the defendant's offender score results in a standard range that exceeds 60 months, the court is limited to imposing a 60 month term of incarceration. *See* RCW 9.94A.599.

Felony DUI and physical control are "crimes against persons." *See* RCW 9.94A.411(2). Thus, community supervision must be ordered. *See* RCW 9.94A.715(1). Supervision and incarceration, together, cannot exceed the statutory maximum penalty of 60 months. *See* RCW 9.94A.505(5).

DOSA is not available for a defendant who has been convicted of felony DUI or felony physical control. *See* RCW 9.94A.660(1)(b).

A defendant who is convicted of felony DUI or felony physical control will be subject to a license suspension and an ignition interlock device. *See* RCW 9.94A.603(2) and (3).